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In the Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL L. MEDLOCK, et. al.
PETITIONERS
v.
TIMOTHY J. LEATHERS, et. al.
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Were the Equal Protection rights of the members of the Petitioner–class of cable operators and subscribers violated by Arkansas' statutory scheme of imposing Sales Taxes, for a two year period during 1987–1989, and did the Arkansas Supreme Court misapply this Court's objective standards for Equal Protection analysis purposes, on remand, when it decided it could ignore the evidentiary record established in the case and the applicability of the law of the case doctrine; and, instead, that it could "hypothesize" an independent "rational basis" for sustaining the discriminatory imposition of Arkansas' Sales Taxes upon the subscription sales of the same television programming by cable and satellite broadcast methods?

2. For the two year period of time during 1987–1989, was the statutory scheme for imposing Arkansas' Sales Taxes, so "unduly discriminatory" against the sale of cable television services, that such statutory scheme (on its face) violated Congress' preemptive prohibition against the discriminatory levying of general taxes against cable television services (47 U.S.C. § 542(g)(2)(A))?

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No. 92-1649

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR THE PETITIONERS

Respondent Leathers has filed the only Brief in Opposition to the Petition for Certiorari in this case. Such Brief in Opposition fails to address or comment upon, in any manner, the principal reason the Petitioners seek this Court's second review of this case: i.e., the direct conflict that exists between the Arkansas Supreme Court and the appellate courts of Arkansas' sister states and the Court of Appeals for the District of Columbia, regarding the proper application of the Equal Protection Clause analysis in factual situations involving virtually identical classifications of highly sophisticated mediums of electronic mass communication. This Brief in Opposition principally attempts to bolster the subjective "duty to hypothesize" standard adopted by the Arkansas Supreme Court by offering several other speculative bases that would allegedly sustain the discriminatory classification of similarly situated television subscriber-taxpayers that was statutorily created by the adoption of Act 188 of 1987. The Petitioners respond to Respondent Leathers' Brief in Opposition as follows:

I. THE ARGUMENTS MADE BY RESPONDENT LEATHERS ENHANCE, INSTEAD OF DETRACT FROM, THE REASONS ASSERTED BY THE PETITIONERS AS TO WHY THIS COURT SHOULD GRANT THEIR PETITION FOR CERTIORARI AND DECIDE THEIR EQUAL PROTECTION CLAUSE BASED CHALLENGE TO THE DISCRIMINATORY IMPOSITION OF ARKANSAS' SALES TAXES UPON THE SALES TO THE SIMILARLY SITUATED SUBSCRIBERS TO CABLE AND

"SCRAMBLED" TELEVISION PROGRAMMING SERVICES.

A. Existing Conflict. It is most important to note that Respondent Leathers has totally failed to address the primary reason asserted by the Petitioners as to why this Court should grant their Petition for Certiorari; i.e., that a conflict exists between the decision in this case by the Arkansas Supreme Court and the decisions of other federal and state appellate courts, as to the proper application of the *objective* standards previously mandated by this Court for use in applying the minimum scrutiny test in Equal Protection Clause based challenges to state and local taxes. Accordingly, the Petitioners submit that by such omission, Respondent Leathers is acknowledging and admitting that a real conflict does exist between the decisions of the Arkansas Supreme Court in this case and that court's prior decision in *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918 (Ark., 1991) *cert. denied*, 112 S. Ct. 617 (1991), and the decisions of the Wisconsin Supreme Court in *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis., 1990); the Illinois intermediate appellate court in the case of *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988); and the decision of the Court of Appeals for the District of Columbia in the case of *Beach Communications, Inc. v. F.C.C.*, 959 F.2d 975 (C.A.D.C., 1992), and *Beach Communications, Inc. v. F.C.C.*, 965 F.2d 1103 (C.A.D.C., 1992) (which Equal Protection case is now pending decision by this Court). [1]

B. Additional Cases Pending. Since the filing of the Petition for Certiorari in this case, the Virginia Supreme Court, in the case of *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, Virginia Supreme Court, Docket No. 93–0062, [2] entered an Order on April 26, 1993, granting the cable operator's request for a

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[1] See *F.C.C. v. Beach Communications, Inc.*, U.S. Sup. Ct. Docket No. 92–603, 113 S. Ct. 594 (1992).

[2] The Virginia Supreme Court's original decision in the *Cox Cable Hampton Roads* case appears at 242 Va. 394, 410 S.E.2d 652 (Va., 1991).

second appellate review of that case; this time to review the cable operator's Equal Protection Clause based challenge to a local gross receipts based tax that is imposed upon the sale of cable television services, but *not* upon the sale of "scrambled" satellite services or SMATV services. This *Cox Cable Hampton Roads* case presents a factual situation and a procedural history that are indistinguishable from those presented in the instant case for this Court's consideration. These cases have followed a parallel history of First Amendment and Equal Protection Clause review by this Court and the Virginia Supreme Court, and the Virginia Supreme Court has now granted the taxpayers' request for a second review on the Equal Protection issue; the same relief sought by the Petitioners here.

The Petitioners have also ascertained that there are additional Equal Protection Clause based challenges to state taxes now pending by cable operators in Kentucky [3] and Connecticut. [4] Thus, the Petitioners submit that this *Medlock* case presents an important Equal Protection Clause issue that is being litigated in numerous forums, and which Equal Protection issue should be considered, and definitively decided by this Court.

C. A "Rational Basis" May *Not* Be Conceived At Any Time. Respondent Leathers erroneously argues (Br. Opp. 1–5) that, in a court's application of the "rational basis" or "minimum

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[3] *Telecable of Lexington, Inc. v. Board of Education of Fayette County, et. al.*, Fayette County Kentucky Circuit Court, Fourth Division, Docket No. 91–CI–4637.

[4] There are seven (7) separate cases now pending in the Superior Court, Judicial District of Hartford – New Britain, Connecticut, where cable operators are challenging state taxes imposed by the Commissioner of Revenue Services of the State of Connecticut. See, *Group W Cable, Inc.*, Docket No. CV–83–0285618S; *United Cable Television Corporation of Connecticut*, Docket No. CV–83–0285620S; *Laurel Cablevision, Inc.*, Docket No. CV–83–0285621S; *Telesystems of Connecticut*, Docket No. CV–83–0285623S; *Community Television Systems, Inc.*, Docket No. CV–83–0285625S; *Bridgeport Cable Television Associates*, Docket No. CV–83–0285626S; and *Hartford CATV, Inc.*, Docket No. CV–83–0285627S.

scrutiny" tests for Equal Protection purposes, the reviewing court is entitled to "hypothesize" or "conceive" of *any* possible basis to justify the discriminatorily imposed tax that is being challenged, at *any* time in the proceeding, without regard to the facts established in evidentiary record. Petitioners submit that such assertion is in error. Respondent Leathers fails to cite *any* decision of this Court in support of this supposition. Instead, he cites as his authority *only* prior Equal Protection decisions of the Arkansas Supreme Court. The Respondent cannot so hoist himself by his own petard; he must rely only upon this Court's prior precedents.

If the proper application of Equal Protection standards was as alleged by the Respondent, i.e., an "activist" court could "hypothesize" or "conceive" of a "rational basis" to justify the discriminatorily imposed tax, at *any* time (even where the case was on appeal), why would there by *any* necessity for trial and the establishment of an evidentiary record in a case involving an Equal Protection challenge. In deed, under Respondent Leathers' theory, a party could "hypothesize" a purported "rational basis" on appeal that he had *not* raised in the trial court, or a reviewing court would be entitled to "subjectively" determine: (1) a state purpose, and (2) a "rational basis" for the challenged tax at its fancy, by mere "speculation," without regard to the evidentiary record established in the case. The Petitioners submit that this assertion is totally erroneous, it is "irrational," and it is in direct conflict with *all* the prior decisions of this Court. See, e.g., *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), *Williams v. Vermont*, 472 U.S. 14 (1985), and *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992).

In this case, the (1) legitimate state purpose, and (2) the "rational basis" asserted, on remand, by the Intervenor – City of Fayetteville, Arkansas (and the one apparently adopted by the Arkansas Supreme Court), i.e., the Arkansas legislature *could* have been trying to encourage the flow of information to rural areas by not taxing the sale of "scrambled" satellite television services to Arkansas subscribers, when it passed Act 188 of 1987, has absolutely *no* factual basis in the evidentiary record in this case. This purported "rational basis" was untimely raised, for the

first time, on remand from this Court (four (4) years after trial, and even three (3) years after the passage of Act 769 of 1989, the statutory amendment that attempted to eliminate the discriminatory classification in question here); and the assertion of this "rational basis" is rebutted by the Arkansas General Assembly's adoption of Act 769 of 1989, only two (2) years later, to extend the state's Sales Taxes to the gross proceeds realized from the sale of "scrambled" satellite television services to Arkansas subscribers. At the trial of this case in May of 1988, the Respondents totally defaulted upon the state's obligation to assert a legitimate state purpose or a "rational basis" for the challenged Sales Taxes, and they did *not* offer *any* evidence to support their position or to negate the evidence offered by the Petitioners. [5] In fact, through the time of this Court's first review of this case in 1991 (*Leathers v. Medlock*, 111 S.Ct. 1438 (1991)), the State of Arkansas had asserted *only* that Act 188 of 1987 was adopted for the purpose of raising revenue, and that "scrambled" satellite television services were either overlooked by or unknown to the Arkansas General Assembly when Act 188 of 1987 was adopted, though this omission was cured two (2) years later by the adoption of Act 769 of 1989.

Therefore, the Petitioners submit that the new "hypothesized" reasons for a "rational basis," which were raised by the Intervenor or which were set forth in Respondent Leathers' Brief in Opposition, cannot be raised for the first time on appeal, and that the Arkansas Supreme Court committed clear error in so acting upon any of these alleged "rational bases." The Petitioners submit that Respondent Leathers' assertion that a reviewing court may "conceive" or "hypothesize" a "rational basis" at *any* time is a concept that is an aberrant ruling that is totally out of step with

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[5] The Petitioners do not seek a remand to the trial court for further proceedings. Instead, they submit that because the State of Arkansas defaulted on its opportunity to timely present arguments and evidence in support of the challenged legislative Act, that the Petitioners are entitled to judgment and a refund of their Sales Taxes that were illegally exacted from them for the two-year period still in question.

this Court's long established standards for Equal Protection analysis in the review of challenges to state taxes.

D. No Additional "Rational Basis" Exists. Respondent Leathers attempts to assert four (4) additional "rational bases" (Br. Opp. 7–11) to allegedly sustain the discriminatory taxing scheme that was created for imposing Arkansas' Sales Tax by the adoption of Act 188 of 1987, and which existed for two (2) years, until the Arkansas General Assembly's passage of Act 769 of 1989. The Petitioners submit that these four (4) additional "rational bases" were not only untimely asserted, and without factual basis in the evidentiary record, but, to be charitable, they can only be described as having no substantive basis. In fact, these four (4) alleged bases, combined with the "duty to hypothesize" standard adopted by the Arkansas Supreme Court in this case, leads to what would be, in effect, a "star chamber" proceeding with Orwellian overlays of legal doublespeak. The Petitioners submit that these four (4) additional bases asserted by Respondent Leathers are an exercise in pure tautological reasoning, which action Justice Stevens warned against in his dissenting opinion in *Nordlinger v. Hahn*, 112 S. Ct. at 2344. In this regard, this Court has previously noted:

> A state cannot deflect an Equal Protection challenge by observing that in light of the statutory classification all those within the burden class are similarly situated. The classification must reflect preexisting differences; it cannot create new ones that are supported by only their own bootstraps. The Equal Protection Clause requires more of a state law than nondis–criminatory application within the class it establishes.

Rinaldi v. Yeager, 384 U.S. 305, 308 (1966), and *Williams v. Vermont*, 472 U.S. 14, 27 (1985).

In the proper application of the *objective* standards previously mandated by this Court for the interpretation of statutes that are under an Equal Protection Clause challenge, this Court has

consistently held that the resulting classification must rest on a real, not feigned, difference (*Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954)); "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" (*Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); and the classification must rationally further a legitimate state purpose (*Nordlinger v. Hahn*, 112 S. Ct. at 2332).

Though Petitioners acknowledge that it is the "rare" case where this Court has found that an unconstitutional classification exists for tax purposes, [6] the Petitioners submit that the discriminatory imposition of Arkansas' Sales Taxes upon subscribers to cable television programming, while *not* imposing the same Sales Tax on subscribers to "scrambled" satellite television for the identical programming (for this two-year period), presents a classification that is feigned, illusory, palatably arbitrary, and therefore, this appeal presents another "rare" case where the Equal Protection Clause should be applied to strike down the challenged tax that was arbitrarily imposed for a two-year period *only* upon certain members of the same class who were subscriber-taxpayers to the same television programming.

The Petitioners submit that the factual and procedural record in this *Medlock* case presents this Court with an excellent opportunity for drawing "bright-line" distinctions for Equal Protection purposes, as guidance for the inferior federal and state courts that must deal with questions of fair and constitutional

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[6] As Justice Stevens noted in his dissent opinion in *Nordlinger v.* Hahn, 112 S. Ct. at 2342, "deference is not abdication, and "rational basis scrutiny is still scrutiny." He further noted that, under this Court's modern application of this "rational basis scrutiny" the Court has recently found five such "rare" instances in the cases of *Allegheny Pittsburgh, Coal v. County Commissioner*, 488 U.S. 336 (1989), *Metropolitan Life Insurance Co. v. Ward*, *supra*; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); and *Zobel v. Williams*, 457 U.S. 55 (1982).

taxation of the ever evolving new businesses in the electronic segment of the mass communications industry.

E. Applicability Of The Law Of The Case Doctrine. Petitioners submit that Respondent Leathers has not offered any cogent reasons (Br. Opp. 11–12) as to why the "law of the case doctrine" is not applicable in this case to the various courts' prior classification of cable television subscribers and "scrambled" satellite television subscribers as being similarly situated (especially when these similarly situated subscribers receive the identical television programming) for constitutional evaluation purposes. Notwithstanding the assertions in Respondent Leathers' Brief in Opposition that this doctrine is inapplicable here, the Petitioners submit that the Arkansas Supreme Court, in its original decision, [7] made a proper analysis of the factual record, and properly determined that the *only* comparison that should be made for constitutional analysis purposes was the "intramedia classification" of cable television subscribers and "scrambled" satellite television subscribers being similarly situated. This Court remanded this case to the Arkansas Supreme Court to determine if such classification, that was created by the statutory scheme of taxation that existed in Arkansas for this two–year period, violated the cable subscriber–taxpayers' Equal Protection rights. [8]

On remand in this case, the Arkansas Supreme Court should have made its Equal Protection analysis on the basis of this previously determined "intramedia" classification. That court should *not* have engaged in the "speculation" it did in erroneously finding (without citation to authority or any facts in the evidentiary record) that the transmission of the identical television programming by cable and "scrambled satellite" were inherently different for Equal Protection analysis purposes. The distinction or difference in classification drawn by Special Justice Mourton, on remand, i.e., there is a distinguishable classification at the initial

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[7] *Medlock v. Leathers*, 301 Ark. 483, 785 S.W.2d 202 (1990).

[8] *Leathers v. Medlock*, 111 S. Ct. at 1447.

point of program transmission, is not only erroneous, but, even if it was accepted as fact, it does *not* present a "real" difference that has *any* relation to the *only* legitimate state purpose asserted by the State at the trial and in initial appeal levels in this case, i.e., the raising of general revenue. The raising of revenue, without the discriminatory imposition of these Sales Taxes, could have been secured by the Arkansas General Assembly's passage of a statute like Act 769 of 1989, initially (in 1987), instead of creating the disparate taxation of cable subscribers and "scrambled" satellite subscribers for a two-year period by the passage of Act 188 of 1987.

The Arkansas Supreme Court made a proper classification of the taxpayers in its 1990 decision. Such classification was *not* challenged by the State of Arkansas on the original appeal to this Court. Therefore, the Petitioners submit that the "law of the case doctrine" applies in this case, and such doctrine should have estopped the Arkansas Supreme Court from differently reclassifying cable and "scrambled" satellite television services, on remand, for Equal Protection analysis purposes.

II. IN THE CABLE COMMUNICATIONS POLICY ACT OF 1984, CONGRESS PREEMPTIVELY BARRED STATES FROM IMPOSING GENERAL TAXES IN AN "UNDULY DISCRIMINATORY" MANNER AGAINST CABLE TELEVISION SERVICE.

In Respondent Leathers' response to the Petitioners' Supremacy Clause argument (Br. Opp. 13-16), he erroneously assumes that Congress has to have intended to preempt *all* aspects of a subject area by legislation, or else any type of preemption, under the Supremacy Clause, is inapplicable. The Petitioners submit that such a legal assertion is totally at odds with this Court's prior decisions under the Supremacy Clause, especially in the instance of a conflict between a federal regulation and a state's constitutional provision that affected cable television. See, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

Here, the Petitioners are *not* asserting that Congress ever forbade the states from imposing taxes of a general nature upon cable television services when it enacted the Cable Communications Policy Act of 1984. As clearly stated in the Petitioners' Petition for Certiorari (pgs. 25–28), Congress selectively preempted state or local governments from attempting to make cable television a new "cash cow" for revenue generation purposes, by providing that taxes of a general nature could *not* "unduly discriminate" against the cable operator, so as to effectively constitute a tax directed at cable television service. It is exactly this limited type of factual situation that the Petitioners have established existed in the evidentiary record in this case, and it is clear that Congress' selective and limited preemption (47 U.S.C. § 542(g)(2)(A) against the imposition of general taxes in an "unduly discriminatory" manner against cable television operators and subscribers is applicable in this case. Therefore, the Petitioners submit that their Supremacy Clause based preemption argument is valid, and provides this Court with a secondary basis for granting their Petition for Certiorari.

CONCLUSION

For the particular reasons stated above, the Petitioners' submit that a second Writ for Certiorari to the Arkansas Supreme Court should be granted in this case, so as to provide this Court with a vehicle to answer the important Equal Protection and Supremacy Clause questions that have been presented by the Petitioners.

Respectfully submitted,

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